UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VOLTAGE PICTURES, LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CA. 1:10-cv-00873-RMU**
	)	
DOES 1 – 5,000	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO MOTIONS TO QUASH [DOC. NOS. 15, 16]

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I. INTRODUCTION

Plaintiff submits this opposition to two motions filed as purported motions to quash that raise issues not previously presented by numerous other motions to quash/motions to dismiss, for which Plaintiff has already filed an opposition.

To briefly summarize Plaintiff's case, Plaintiff has identified certain Defendants who have unlawfully copied and distributed Plaintiff's motion picture, "*The Hurt Locker*" (the "Movie"), over the Internet. At this point, Plaintiff has only been able to identify the Doe Defendants by their Internet Protocol ("IP") and the date and time of alleged infringement. The only way that Plaintiff can determine Defendants' actual names is from the Internet Service Providers ("ISPs") to which Defendants subscribe and from which Defendants obtain Internet access, as this information is readily available to the ISPs from documents they keep in the regular course of business.

Plaintiff's complaint was filed on May 24, 2010 and named Does 1-5,000 as Defendants. [Doc. No. 1] Plaintiff then filed a Motion for Leave to Take Discovery Prior to the Rule 26(f) Conference, which was granted by this Court on June 25, 2010. [See Doc. No. 4 and Court Minute Order of 6/25/10] Thereafter, Plaintiff served approximately 30 subpoenas on the non-party ISPs, requesting various production dates.

In response to the subpoenas, the ISPs contacted their subscribers for which Plaintiff identified an infringing IP address on the date and time of alleged infringement. Various Doe Defendants moved to quash the subpoenas and dismiss the case primarily based on lack of personal jurisdiction and misjoinder. [See Doc. Nos. 11, 12] On October 18, 2010, Plaintiff

filed a consolidated opposition in response to the arguments raised by those moving Doe Defendants. [Doc. No. 13]

Subsequently, additional Doe Defendants have filed motions to quash claiming that the subpoenas are invalid pursuant to Fed. R. Civ. P. Rule 45. As of the filing of this opposition, Plaintiff's counsel is aware of two such motions that have been filed and placed on the Court's docket – Doc. No. 15 (motion to filed by Margaret Wenzek) and Doc. No. 16 (filed by Audrey Kalblinger).[1] Because the motions do not provide good cause for quashing the subpoenas, Plaintiff requests that the motions and any similar future motions be denied in their entirety, without the need for Plaintiff to file any additional opposition.

II. ARGUMENT

The Doe Defendants advance a number of arguments in their motions: (1) the subpoenas are improper because they are beyond the geographical scope set forth in Fed. R. Civ. P. Rule 45, (2) the subpoenas subject Doe Defendants to undue burden, (3) the subpoenas require disclosure of privileged or protected matter, and (4) the Doe Defendants did not engage in the alleged activity.[2] However, all of these arguments are misplaced.

[1] Plaintiff has received additional motions to quash/motion to dismiss similar to the first set making personal jurisdiction and one motion to quash similar to the two at issue in this opposition, but these motions have not appeared on the Court's electronic docket. As requested in Plaintiff's prior opposition, Plaintiff requests that the Court consider its opposition addressing these arguments apply to all pending and future similar motions.

[2] Ms. Kalblinger's motion [Doc. No. 16] does not actually present argument or analysis; rather, it merely cites the language of Fed. R. Civ. P. Rule 45(c)(3) as its grounds.

A. STANDARDS ON MOTIONS TO QUASH

A person served a discovery subpoena may move either for a protective order under Rule 26(c) or for an order quashing or modifying the subpoena under Rule 45(c)(3). Rule 26(c) authorizes district courts, upon a showing of "good cause" by "a party or by the person from whom discovery is sought" to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 45(c)(3) provides that the court may quash or modify the subpoena if it requires disclosure of privileged or other protected matter, if no exception or waiver applies, or if it subjects a person to undue burden.

"Ordinarily a party does not have standing to object to a subpoena served on a non-party, but a party does have standing to object to a subpoena served upon a non-party which requires the production of privileged information." Covad Commun'ns Co. v. Revonet, Inc., No. 09-MC-102, 2009 WL 3739278, at *3 (D.S.D. Nov. 4, 2009) (citing E.E.O.C. v. Danka Indus., Inc., 990 F. Supp. 1138, 1141 (E.D. Mo. 1997)); Washington v. Thurgood Marshall Academy, 230 F.R.D. 18, 21 (D.D.C. 2005) (Facciola, J.) ("A motion to quash, or for a protective order, should generally be made by the person from whom the documents or things are requested." [citing 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2459 (2d ed.1995)]).

However, that standing to object should limited to only challenging the subpoena on the grounds that it requires disclosure of information "privileged at common law or by statute or rule" and not any other grounds. See Windsor v. Martindale, 175 F.R.D. 665, 668 (D. Colo.1997). "The general rule is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought." Id. (citation omitted); see also Johnson v. Gmeinder, 191 F.R.D. 638, 639 n. 2 (D. Kan.2000); Thomas v.

Marina Assocs., 202 F.R.D. 433, 434 (E.D. Pa.2001); Novak v. Capital Mgmt. & Dev. Corp., 241 F.R.D. 389, 394 (D.D.C. 2007) (Facciola, J.) (stating that "[t]o make a legitimate claim of privilege the Defendants would have had to show some reason to believe that the subpoena threatened the disclosure of information that was protected by a privilege that *these* Defendants could claim") (emphasis added); Amobi v. D.C. Dept. of Corrections, 257 F.R.D. 8, 9-10 (D.D.C. 2009) (Facciola, J.) (holding that District of Columbia Department of Corrections had no right to claim work product or attorney-client privilege with regard to United States Attorney's Office's files relating to former corrections officer's criminal prosecution for assaulting inmate, and thus did not have standing to object to subpoena served on USAO by officer seeking files in connection with officer's civil rights action against Department).

The burden of persuasion in a motion to quash a subpoena is borne by the movant, and the "burden is particularly heavy to support a 'motion to quash as contrasted to some more limited protection.'" Westinghouse Electric Corp. v. City of Burlington, 351 F.2d 762, 766 (D.C. Cir. 1965) (denying a motion to quash supported by two affidavits); US. v. Int'l Bus. Mach. Corp., 83 F.R.D. 97, 104 (S.D.N.Y. 1979); Horizons Titanium Corp. v. Norton Co., 290 F.2d 421, 425 (1st Cir. 1961); see Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 403-04 (D.C. Cir. 1984). The district court must balance "the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena." Heat & Control, Inc. v. Hester Indus., Inc., 785 F.2d 1017, 1024 (Fed. Cir. 1986) (citing Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 560, 564 (7th Cir. 1984)).

Additionally, on a motion to quash a subpoena, the merits of a defendant's defenses are not at issue. See Fonovisa, Inc. v. Does 1-9, 2008 WL 919701, *8 (W.D. Pa.) (stating that "[i]f

Doe # 3 believes that it has been improperly identified by the ISP, Doe # 3 may raise, at the appropriate time, any and all defenses, and may seek discovery in support of its defenses").

B. DOE DEFENDANTS' ARGUMENTS ARE MISPLACED.

1. Even assuming Doe Defendants have standing to object to the service of the subpoenas, Doe Defendants' arguments are severely flawed.

Doe Defendants argue that the subpoenas are invalid. Specifically, Ms. Wenzek argues that "1. Margaret Wenzek lives in the state of Montana. Margaret Wenzek is not located within, or operates any business within, the District of Columbia or within 100 miles of this Court…3. The purported subpoena does not set forth a place for responding thereto that is within 100 miles of the residence or place of business of Margaret Wenzek as required by Fed. R. Civ. P. 45(c)(3)(B)(iii)." [Doc. No. 15 at p. 1][3] Additionally, Ms. Kalblinger cites Fed. R. Civ. P. Rule 45(c)(3)(A)(ii) as grounds for her motion. [Doc. No. 16]

However, Doe Defendants' arguments are severely flawed. First, Doe Defendants misunderstand the basic premise of the subpoenas. The subpoenas have been issued to the ISPs, not the Doe Defendants. Again, the only way that Plaintiff can obtain the information related to the Doe Defendants, including name, address, and corresponding IP address, is from the ISPs. The ISPs are the ones that have to produce documents and information in response to the subpoena, not the Doe Defendants. Accordingly, the entities with standing to object on service grounds – the ISPs – have not done so. The Doe Defendants do not have standing to object to the form of the subpoena, only whether it requires production of documents or information for which the Doe Defendants have a privileged interest.

[3] Ms. Kalblinger also cites Fed. R. Civ. P. Rule 45(c)(3)(B)(iii) as grounds for her motion. [Doc. No. 16]

Even assuming the Doe Defendants somehow have standing to object to how the subpoenas were served on the ISPs, the Doe Defendants' arguments are severely flawed. The two provisions of Rule 45 cited by the Doe Defendants for quashing the subpoenas on service grounds only apply to subpoenas that require a witness to *travel* more than 100 miles. The provisions relevant to the topic here are:

> *When Required*. On timely motion, the issuing court must quash or modify a subpoena that: … (ii) requires a person who is neither a party nor a party's officer *to travel more than 100 miles* from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held.

Rule 45(c)(3)(A)(ii) (emphasis added).

> When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires: … (iii) a person who is neither a party nor a party's officer to incur substantial expense *to travel more than 100 miles* to attend trial.

Rule 45(c)(3)(B)(iii) (emphasis added).

First, again, the subpoenas at issue here were directed and sent to the ISPs.[4] The subpoenas do not require any action from the Doe Defendants and definitely do not require the Doe Defendants to travel anywhere. Overall, it is completely irrelevant where the Doe Defendants live in relation to where the subpoena was served or where the documents are to be produced.

Second, because the subpoenas only request the production of documents, and not the personal appearance of anyone for deposition or trial, no one is required to travel anywhere. While Rule 45 does not prescribe an exact method by which a subpoenaed witness must produce

[4] Doe Defendants have merely received a copy of the subpoena along with notice from their ISPs that their information is being subpoenaed by Plaintiff.

documents, it does state that the witness need not actually appear at the place requested for production:

> Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

Rule 45(c)(2)(A). Therefore, neither Rule 45(c)(3)(A)(ii) nor Rule 45(c)(3)(B)(iii) justify quashing the subpoenas because no travel is required – the documents and information can be produced by mail, fax, or email.

Lastly, courts have continually enforced subpoenas served outside of the issuing district court and beyond 100 miles from the place called for production. As stated in this Court:

> Counsel's argument that the subpoena is invalid because it requires CFS to produce documents at a location "well over the 100 mile limit set forth in Rule 45(c)(3)(A)(ii)" also is flawed; the 100 mile limit applies to travel by a subpoenaed person, but a person commanded to produce documents "need not appear in person at the place of production or inspection." See Fed.R.Civ.P. 45(c)(2)(A). The subpoena can be enforced.

Walker v. Center for Food Safety, 667 F.Supp.2d 133, 138 (D.D.C. 2009) (Collyer, J.).

Similarly, in Premier Election Solutions, Inc. v. Systest Labs Inc., 2009 WL 3075597 (D. Colo. September 22, 2009), that court stated:

> [t]he court finds Rule 45(c)(3)(A)(ii)'s 100-mile range limitation inapplicable to the case at bar. First, as stated in the subpoena itself, '[a] person commanded to produce documents ... need not appear in person at the place of production ... unless also commanded to appear for a deposition, hearing, or trial.' Fed.R.Civ.P. 45(c)(2)(A). Nonparty iBeta has not been commanded to appear for a deposition, hearing or trial in this matter, but only to produce documents. Furthermore, iBeta's production of documents thus far in response to SysTest's subpoena has been by email and regular mail (Resp., Ex. 20, Attach.A), and there is no indication that iBeta intends to travel anywhere to produce any other documents. Since the subpoena does not require any representative of iBeta to travel anywhere, much less beyond Rule 45's 100-mile limitation, iBeta is not excused from obeying the subpoena on this basis.

Id., 2009 WL 3075597, *3.

Finally, in U.S. Bank Nat. Ass'n v. James, 264 F.R.D. 17, 19-20 (D. Maine 2010), that court stated:

> Finally, the defendant invokes Fed.R.Civ.P. 45(b)(2)(B) as the basis for quashing the subpoena directed to 'a financial institution in Cambridge, Massachusetts which is more than 100 miles outside the district [of Maine].' Motion at [3]. But, that subsection of the rule only provides that a subpoena may be served 'outside that district but within 100 miles of the place specified for the ... production[.]' The subsection of the rule applicable to a motion to quash provides that a subpoena may be quashed if it requires a person to travel more than 100 miles from where he or she is employed, resides, or regularly transacts business in person. Fed.R.Civ.P. 45(c)(3)(A)(ii). By contrast, the subpoenas at issue only require the production of documents, and those documents can be 'produced' at the specified address in Portland, Maine, by mail. Indeed, Rule 45(c)(2)(A) specifically provides that a person commanded to produce documents 'need not appear in person at the place of production.' [¶] Even assuming that the defendant has standing to raise this objection to the subpoena, a majority of the courts that have dealt directly with the 100-mile issue have held that such a subpoena should be enforced.

Id., 264 F.R.D. at 19-20 (citations omitted); see also Ice Corp. v. Hamilton Sundstrand Corp., 2007 WL 1364984, at *3 (D. Kan. May 9, 2007) (quoting Stewart v. Mitchell Transport, 2002 WL 1558210, at *3 (D. Kan. July 8, 2002) (declining to quash the subpoena at issue because the subpoenas did not require any of the entities served to travel in violation of Rule 45's 100-mile limitation)); Tubar v. Clift, 2007 WL 214260 (W.D. Wash. January 25, 2007) (holding that even though Rule 45(b)(2) requires service within 100 miles of the place of production or copying of records, a subpoena served in New Jersey for the production of documents in Washington nonetheless was enforced because, pursuant to Rule 45(c)(2)(A), no individual was required to escort the requested records personally); Jett v. Penner, 2007 WL 127790 (E.D. Cal. January 12, 2007) (a request for a file was not quashed, although the file was located more than 100 miles away because the request was only for the file itself and there was no requirement that a nonparty travel more than 100 miles in order to supply it).

2. Doe Defendants have not, and cannot, demonstrate any undue burden on them.

Doe Defendants argue that the subpoenas impose an undue burden upon them. However, this argument is also misplaced. Again, the subpoenas are not directed to them and do not require them to do anything in response to them.

Here, Plaintiff has already demonstrated good cause for the subpoena in that the information is absolutely necessary in this case so that Plaintiff can ascertain the true identities of the alleged infringing Doe Defendants and that Plaintiff can only obtain the information by issuing subpoenas to the ISPs. Therefore, Plaintiff's need for the identifying information is great, as the information is critical to the prosecution of this lawsuit.

In contrast, the burden on the moving Doe Defendants is slight, if there is any at all. The moving Doe Defendants have not shown any annoyance, embarrassment, oppression, or any undue burden or hardship they would incur if the information is divulged to Plaintiff. Additionally, Doe Defendants cannot claim that the subpoena is unreasonable or oppressive, because they are not the ones responding to the subpoenas. Lastly, Doe Defendants have not shown why quashing the subpoenas is necessary when other, more limited methods are available to address any concerns.

3. Doe Defendants have not, and cannot, demonstrate that the information sought is privileged.

Doe Defendants argue that the subpoenas request privileged or confidential information and that Doe Defendants have the constitutional right to speak anonymously. However, such an argument has no basis in law or in fact for this case. First, it must be noted that these two

moving Doe Defendants have actually divulged the very information they seek to keep private – their names and addresses. Therefore, they have waived any argument that this information is privileged or private.

As further detailed in Plaintiff's motion for discovery [Doc No. 4], a person using the Internet to distribute or download copyrighted music without authorization is not entitled to have their identity protected from disclosure under the First Amendment. See Interscope Records v. Does 1-14, 558 F.Supp.2d 1176, 1178 (D. Kan. 2008); see also Arista Records LLC v. Does 1-19, 551 F. Supp. 2d 1, 8-9 (D.D.C. 2008) (Kollar-Kotelly, C.) (finding that the "speech" at issue was that doe defendant's alleged infringement of copyrights and that "courts have routinely held that a defendant's First Amendment privacy interests are exceedingly small where the 'speech' is the alleged infringement of copyrights"); Guest v. Leis, 255 F.3d 325, 336 (6th Cir. 2001) ("computer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person—the system operator"); Sony Music Entm't, Inc. v. Does 1–40, 326 F.Supp.2d 556, 566 (S.D.N.Y. 2004) ("defendants have little expectation of privacy in downloading and distributing copyrighted songs without permission"); Arista Records, LLC v. Doe No. 1, 254 F.R.D. 480, 481 (E.D.N.C. 2008); U.S. v. Hambrick, 55 F. Supp. 2d 504, 508 (W.D. Va. 1999), aff'd, 225 F.3d 656 (4th Cir. 2000); U.S. v. Kennedy, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (stating that defendant's Fourth Amendment rights were not violated when an ISP turned over his subscriber information, as there is no expectation of privacy in information provided to third parties).

While some courts have held that the anonymous downloading and distribution of music over the Internet constitutes protected First Amendment speech, the protection afforded such speech is limited and gives way in the face of a *prima facie* showing of copyright infringement.

"Defendants' First Amendment right to remain anonymous must give way to the plaintiffs' right to use the judicial process to pursue what appear to be meritorious copyright infringement claims." Sony Music Entm't, Inc. v. Does 1-40, *supra*, 326 F. Supp. 2d at 567.

Here, Plaintiff has made a *prima facie* case of copyright infringement in this case, and Plaintiff's need for disclosure outweighs the First Amendment privacy interests here. See Complaint, ¶¶ 9-12; Sony Music Entm't, Inc. v. Does 1-40, *supra*, 326 F. Supp. 2d at 565 (stating that plaintiffs made concrete showing of a prima facie claim of copyright infringement by alleging valid ownership of copyrights and "that each defendant, without plaintiffs' consent, 'used, and continues to use an online media distribution system to download, distribute to the public, and/or make available for distribution to others' certain of the copyrighted recordings").

Further, Plaintiff has already demonstrated good cause for the subpoena in that the information is absolutely necessary in this case so that Plaintiff can ascertain the true identities of the alleged infringing Doe Defendants and that Plaintiff can only obtain the information by issuing subpoenas to the ISPs. Additionally, Plaintiff is only seeking limited information sufficient to identify each Doe Defendant, and Plaintiff will only use that information in this lawsuit. Therefore, the Doe Defendants are protected from any improper disclosure or use of their information.

4. The merits of Doe Defendants' defenses are not at issue on a motion to quash.

Some Doe Defendants state that they never downloaded Plaintiff's copyrighted movie or provide some other defense why they should not be held liable for the alleged infringement. Other Doe Defendants, even if not expressly stated, make this implication that they did not

engage in the infringing activity. However, these statements amount to nothing more than these Doe Defendants' potential defenses in this case.

The merits of this case are not relevant to the issue of whether the subpoena is valid and enforceable. The court typically only examines the relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described, and the burden imposed to determine whether there is an "undue burden." Flatow v. Islamic Republic of Iran, 196 F.R.D. 203, 206 (D.D.C. 2000), *vacated in part and affirmed in part on other grounds*, 305 F.3d 1249 (D.C. Cir. 2002). As shown below, there is no burden on the Doe Defendants, and Plaintiff's need for the documents is critical.

Further, as stated above, the Doe Defendants only have standing to quash the subpoenas to the extent they require disclosure of privileged or other protected matter. To the extent Doe Defendants' arguments infer that as a ground for quashing the subpoenas, it is addressed herein. Overall, even though the Doe Defendants may have valid defenses to this suit, such defenses are not at issue at this stage of the proceedings. See Fonovisa, Inc. v. Does 1-9, 2008 WL 919701, *8 (W.D. Pa.) (stating that "[i]f Doe # 3 believes that it has been improperly identified by the ISP, Doe # 3 may raise, at the appropriate time, any and all defenses, and may seek discovery in support of its defenses").

III. CONCLUSION

Overall, Doe Defendants have not demonstrated any reason to quash the subpoenas. As fully laid out in Plaintiff's Motion for Leave to Take Discovery, which was granted by the court, courts have routinely allowed discovery to identify "Doe" defendants in cases almost identical to

this one. See, e.g., Metro-Goldwyn-Mayer Pictures Inc., et al. v. Does 1-10, Case No. 04-2005 (JR) (D.D.C.) (Robertson, J.); Twentieth Century Fox Film Corp., et al. v. Does 1-9, Case No. 04-2006 (EGS) (D.D.C.) (Sullivan, E.); Lions Gate Films, Inc., et al. v. Does 1-5, Case No. 05-386 (EGS) (D.D.C.) (Sullivan, E.); UMG Recordings, et al. v. Does 1-199, Case No. 04-093 (CKK) (D.D.C.) (Kollar-Kotelly, C.); Caroline Records, Inc., et al. v. Does 1-175, Case No. 04 2028 (D.D.C.) (Lamberth, R.); see also Warner Bros. Records, Inc. v. Does 1-6, 527 F.Supp.2d 1, 2 (D.D.C. 2007).

Plaintiff has shown good cause for obtaining information related to the Doe Defendants from the non-party ISPs, especially when considering that these ISPs typically retain user activity logs containing the information sought for only a limited period of time before erasing the data. Therefore, the court should deny these motions and any similar future motions and at least allow Plaintiff the opportunity to conduct discovery and obtain evidence to prove the copyright infringement and irreparable harm in this case.

Respectfully Submitted,

VOLTAGE PICTURES, LLC

DATED: November 9, 2010

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2010, a true and correct copy of the foregoing PLAINTIFF'S OPPOSITION TO MOTIONS TO QUASH [DOC. NOS. 15, 16] was sent via first-class mail as follows:

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/s/
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